

tory decree to control the rights of the parties, unless modified or reversed on appeal, until the final decree in the general adjudication suit is entered. At that time the district court may after hearing make such modifications in the interlocutory decree as are necessary to fit it into the final decree without conflict.

History: C. 1943, 100-4-24, added by L. 1948 (1st S.S.), ch. 14, § 7.

NOTES TO DECISIONS

In general.

This statute is permissive and not manda-

tory. *Mitchell v. Spanish Fork W. Field Irrigation Co.*, 1 Utah 2d 313, 265 P.2d 1016 (1954).

COLLATERAL REFERENCES

C.J.S. — 93 C.J.S. Waters § 194.

Key Numbers. — Waters and Water Courses — 152(2).

CHAPTER 5

ADMINISTRATION AND DISTRIBUTION

Section		Section	
73-5-1.	Appointment of water commissioners — Procedure — Hearing to determine adequacy of underground water supply.	73-5-9.	Powers of state engineer as to waste, pollution or contamination of waters.
73-5-2.	Bond.	73-5-10, 73-5-11.	Repealed.
73-5-3.	Control by engineer of division and distribution under judgments.	73-5-12.	Owners of reservoirs to supply data to state engineer — Installation of gauges.
73-5-4.	Head gates and measuring devices.	73-5-13.	Notice of claim to surface or underground water not otherwise represented — Filing — Form — Information and proof required — Corrections — Prima facie evidence of rights.
73-5-5.	Construction and repair of dams — Submission of plans to engineer for approval — Supervision and inspection — Payment of expenses — Penalty for violation — Exceptions.	73-5-14.	Determination by the state engineer of watershed to which particular source is tributary — Publications of notice and result — Hearing — Judicial review.
73-5-6.	Examination of dams by engineer — Regulation of storage — Expenses.		
73-5-7.	Inspection of ditches and diverting works by engineer.		
73-5-8.	Reports by users to engineer.		

73-5-1. Appointment of water commissioners — Procedure — Hearing to determine adequacy of underground water supply.

(1) If, in the judgment of the state engineer or the district court, it is necessary to appoint one or more water commissioners for the distribution of water from any river system or water source, the commissioner or commissioners shall be appointed annually by the state engineer. The state engineer shall determine whether all or a part of a river system or other water source shall be served by a commissioner, or commissioners, and if only a part is to be

served, shall determine the boundaries of that part. The state engineer may also appoint a single commissioner to act on several separate and distinct water sources.

(2) The state engineer shall consult with the water users before appointing a commissioner. The form of consultation and notice to be given shall be determined by the state engineer so as to best suit local conditions, while providing for full expression of majority opinion.

(a) If a majority of the water users, as a result of such consultation:

(i) agree upon some competent person or persons to be appointed as water commissioner or commissioners, the duties the person or persons shall perform, and the compensation the person or persons shall receive; and

(ii) make recommendations to the state engineer as to such matters or either of them, then the state engineer shall act in accordance with their recommendations.

(b) If a majority of water users do not agree as to such matters, then the state engineer shall make a determination for them.

(3) (a) The salary and expenses of the commissioner or commissioners and all other expenses of distribution, including printing, postage, equipment, water users' expenses, and any other expenses considered necessary by the state engineer, shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the state engineer. The schedule shall be based on the established rights of each water user, and the pro rata share shall be paid by each water user to the state engineer in advance on or before May 1 of each year.

(b) Upon any failure to do so the state engineer may:

(i) create a lien upon the water right affected by filing a notice of lien in the office of the county recorder in the county where the water is diverted;

(ii) forbid the use of water by any such delinquent, or by any of the delinquent's successors or assigns, while the default continues;

(iii) bring an action in the district court for the unpaid expense and salary, and foreclose the lien, or the district court having jurisdiction of the person may issue upon any delinquent user an order to show cause why a judgment for such sum should not be entered.

(c) In any action brought to collect any unpaid assessment or to enforce any lien under this section, the delinquent water user shall be liable for the amount of the assessment, interest, any penalty, and for all costs of collection, including all court costs and a reasonable attorney fee.

(4) The commissioner or commissioners may be removed by the state engineer for cause. The users of water from any river system or water source may petition the district court for the removal of any such commissioner or commissioners, and after notice and hearing the court may order the removal of such commissioner or commissioners and direct the state engineer to appoint successors as necessary.

(5) In addition to the power granted to the state engineer to appoint water commissioners for the distribution of water, the state engineer may, at any time, hold a hearing, or upon a petition signed by not less than one-third of the users of underground waters in any area as defined by the state engineer, shall hold a hearing, to determine whether the underground water supply within such area is adequate for the existing claims. Notice of the hearing

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shall be given in a form and manner which, in the judgment of the state engineer, best suits local conditions. The state engineer may make a full investigation and provide findings for the hearing. If the findings show that the water supply is inadequate for existing claims, the state engineer shall divide, or cause to be divided by the water commissioner or water commissioners as provided in this section, the waters within such area among the several claimants entitled to the water in accordance with their respective rights.

History: L. 1919, ch. 67, § 62; 1925, ch. 100, § 1; 1931, ch. 18, § 1; R.S. 1933, 100-5-1; L. 1935, ch. 105, § 1; 1941, ch. 96, § 1; C. 1943, 100-5-1; L. 1953, ch. 131, § 1; 1959, ch. 137, § 1; 1989, ch. 36, § 1.

Amendment Notes. — The 1989 amend-

ment, effective April 24, 1989, inserted the subsection designations throughout; added Subsection (3)(c); and made minor stylistic changes.

Cross-References. — Powers of water commissioners to make arrests, § 73-2-9.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Commissioner in general.

—Appointment.

—Powers and duties.

Contempt.

Expenses borne by users.

—Basis of apportionment.

—Collection of assessments.

—Tax, lien or encumbrance.

"Source."

Constitutionality.

Holdings in action involving construction of former statute that engineer under § 73-4-11 had jurisdiction to distribute water formerly decreed, and that commissioner appointed by engineer under this section superseded appointment of commissioner by court under former decree, did not render statute unconstitutional as impairing obligation of vested rights, since although provision of this section with reference to appointment of commissioner by engineer was mandatory, appointment required consultation with water users, and hence, latter had opportunity to be heard. *Caldwell v. Erickson*, 61 Utah 265, 213 P. 182 (1923).

Commissioner in general.

The primary purpose of a water commissioner is to assist the court in carrying out its decrees. His duties are to aid the courts and the state engineer in the distribution to the various water users of the quantity of water to which each is entitled. The commissioner is an arm of the court and the state engineer in enforcing and protecting the various water users in their rights. He is appointed by the state engineer upon recommendation of the interested water users. The state engineer may remove him for cause upon an application of a

water user and a hearing had thereon. The same power inheres in the court under which he serves. *Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co.*, 90 Utah 283, 61 P.2d 605 (1936).

—Appointment.

Where affidavit for writ of prohibition by state engineer to restrain defendants from jurisdiction of certain waters did not show that appointment of commissioner by engineer was made after consultation, writ was denied. *Caldwell v. Erickson*, 61 Utah 265, 213 P. 182 (1923).

Under former statute held that appointment of commissioner by engineer superseded appointment of commissioner by court under decree. *Caldwell v. Erickson*, 61 Utah 265, 213 P. 182 (1923).

—Powers and duties.

The authority and duty of a water commissioner to distribute water to one or more users holding the right to the use thereof does not cease merely because one of them has undertaken to maintain a means of storing and conveying such water to the place of use. Nor is he relieved of this duty because of any contract that may exist between water users. *Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co.*, 90 Utah 283, 61 P.2d 605 (1936).

Contempt.

Violation of water right decree is not excused by court's failure to appoint water commissioner to measure and distribute waters, or by plaintiff's taking full control of water and refusing to consent to appointment of such commissioner. *Gunnison Irrigation Co. v. Peterson*, 74 Utah 460, 280 P. 715 (1929).

Expenses borne by users.

It depends upon the construction of the con-

tract between the parties fixing their water rights whether the grantor or the grantee is liable for assessments made to defray expenses of water commissioner. *Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co.*, 90 Utah 283, 61 P.2d 605 (1936).

By the terms of this section, only the costs and expenses of the commissioner may be prorated, and other expenses cannot be legally imposed against objecting users. *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (1949) (decided prior to 1953 amendment).

Assessment levied by state engineer against irrigation company to defray expenses of distributing water from a stream was erroneous, where company was not a user of that water, but obtained water from two springs located on its property, and distributed the water through a system of canals exclusively under its maintenance and control, and where services of a river commissioner were not rendered to or needed by the company. *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (1949).

—Basis of apportionment.

That part of this section providing for the prorata apportionment of the expenses and salary of the water commissioner among water users does not contemplate that each individual user should be required to pay an equal amount with every other individual user, but clearly contemplates some method of apportionment having reasonable relation to the services rendered for and benefits received by the respective users. While mathematic exactness is impracticable, yet the nearest approximation to a fair and and ratable division of the burden ought to be adopted. *Bacon v. Gunnison Fayette Canal Co.*, 75 Utah 278, 284 P. 1004 (1930); *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (1949).

Under this section the state engineer cannot adopt as a basis of apportionment of costs of distribution among water users, "whereby the amounts to be assessed and collected from the several water users were determined, not according to the quantity of water each was respectively entitled to use or which was distributed to him, but according to respective areas of land upon which the users were entitled to use water for irrigation," because this method of apportionment results in unequal and disproportionate assessment. *Bacon v. Gunnison Fayette Canal Co.*, 75 Utah 278, 284 P. 1004 (1930).

With reference to assessments under this section, if measurements have been made and kept for a number of years, an assessment based upon average annual acre-feet delivered to water users would meet requirements of

law, and in case no measurements are available, assessments of necessity must be based upon other information, such as amount of precipitation that has fallen upon watershed constituting source of supply. *Bacon v. Plain City Irrigation Co.*, 87 Utah 564, 52 P.2d 427 (1935).

Where state engineer apparently based his assessments under this section upon number of second-feet awarded by proposed determination without regard to whether various rights were primary or secondary, and without regard to probable amount that would be available for use of various water users, basis used in determining assessments held improper, and court in action for assessments erred in excluding evidence of amount of water delivered, since such evidence might have tended to show number of acre-feet of water available to user. *Bacon v. Plain City Irrigation Co.*, 87 Utah 564, 52 P.2d 427 (1935).

Absent any differentiating factors the state engineer could not assess the users of two tributaries to a river and not the users of other tributaries since then the burden would not be borne pro rata. *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

—Collection of assessments.

Complaint in action by state engineer against irrigation company to recover funds to pay water commissioner in which no facts were alleged indicating total amount of water rights awarded by proposed determination or what part of water, if any, was distributed to company, or what basis engineer used in determining amount that should be assessed against company held demurrable. *Bacon v. Plain City Irrigation Co.*, 87 Utah 564, 52 P.2d 427 (1935).

Fact that engineer may have been derelict in consulting with irrigation company about appointment of commissioner could not be taken advantage of as defense in action against irrigation company for assessments for funds with which to pay salary of commissioner. *Bacon v. Plain City Irrigation Co.*, 87 Utah 564, 52 P.2d 427 (1935).

The right of the state engineer to collect assessments from the water user cannot be defeated by an attempt of the water user to assign his or its liability for the payment thereof to another. *Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co.*, 90 Utah 283, 61 P.2d 605 (1936).

Upon receivership of corporation possessing water rights, state engineer was not entitled to preferred claim for prorata share of salary and expenses of water commissioner, nor was purchaser of property of corporation liable therefor where it did not assume any obligation for payment of claim. *In re White Fawn Milling Co.*, 100 Utah 1, 110 P.2d 331 (1941).

—Tax, lien or encumbrance.

Within the meaning of that term as used in a contract fixing water rights, an unpaid water assessment becomes an encumbrance against the water right when the state engineer refuses to deliver the water because the water assessment is not paid. *Minersville Reservoir & Irrigation Co. v. Rocky Ford Irrigation Co.*, 90 Utah 283, 61 P.2d 605 (1936).

This section does not create any tax, lien, or encumbrance against water rights for unpaid prorata share of salary and expenses of commissioner. In re *White Fawn Milling Co.*, 100 Utah 1, 110 P. 2d 331 (1941).

"Source."

It was intended to restrict the meaning of the word "source," as used in this section, to

one origin, such as a stream, a rise from the ground, a fountain, a spring, an artesian basin or some similar body; and it was not intended to combine a river system with springs and artesian basins for purposes of distribution and administration. *Utah Power & Light Co., v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (1949).

Under this section, it was not intended to make the words "water source" so inclusive that every person using surface water, percolating water, spring water or artesian water should be charged with the costs and expenses of a commissioner because some part of their flow could be traced to a common source. *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (1949).

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — Comment, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

Arizona Law Review. — Groundwater Management: Law and Local Response, 6 Ariz. L. Rev. 178.

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Rocky Mountain Law Review. — The Law of Underground Water, 13 Rocky Mtn. L. Rev. 1.

Southern California Law Review. — Need of Unified Law for Surface and Underground Water, 2 So. Calif. L. Rev. 370.

Am. Jur. 2d. — 78 Am. Jur. 2d Waters § 294.

C.J.S. — 94 C.J.S. Waters § 315.

Key Numbers. — Waters and Water Courses = 217.

73-5-2. Bond.

Every water commissioner before entering on his duties shall give a bond to the state for the faithful performance of his duties, in a penal sum to be fixed by the state engineer.

History: L. 1919, ch. 67, § 63; R.S. 1933 & C. 1943, 100-5-2.

Cross-References. — Official oaths and bonds, Chapter 1 of Title 52.

COLLATERAL REFERENCES

C.J.S. — 94 C.J.S. Waters § 315.

Key Numbers. — Waters and Water Courses = 216.

73-5-3. Control by engineer of division and distribution under judgments.

The state engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this title. The state engineer shall divide, or cause to be divided, the water within any district created under the provisions of this title among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and controlled, the use of such water by such closing or partial closing of the head gates, caps, valves or other controlling works of any ditch, canal, pipe, flume, well or tunnel or other means of diversion as will prevent the waste of water or its use in excess of the quantity to which any appropriator is lawfully entitled, and shall regulate, or cause to be regulated, the controlling works of reservoirs in accordance with the provisions of this title. Whenever in pursuance of his duties the state engineer regulates or causes to be regulated any head gate, cap, valve or other controlling works of any ditch, canal, pipe, flume, well or tunnel or other means of diversion or the controlling works of any reservoir, he may attach to such controlling works a written notice, properly dated and signed, setting forth that such controlling works have been properly regulated and are wholly under his control, and such notice shall be a legal notice as to the facts therein contained to all parties interested in the division and distribution of the water of such ditch, canal, pipe, flume, well or tunnel or other means of diversion or reservoir. Whenever the state engineer is required to enter upon private property in order to carry out the provisions of this title and is refused by the owner or possessor of such property such right of entry, he may petition the district court for an order granting such right, and after notice and hearing the court may grant such permission, on security being given to pay all damage caused thereby to the owner of such property.

History: L. 1919, ch. 67, § 64; R.S. 1933, 100-5-3; L. 1935, ch. 105, § 1; C. 1943, 100-5-3.

Cross-References. — Interference with diversion works, §§ 73-1-14, 76-10-201 to 76-10-204.

NOTES TO DECISIONS

Effect of appointment of commissioner.

Under former statute held that appointment of commissioner by engineer superseded ap-

pointment of commissioner by court under previous decree. *Caldwell v. Erickson*, 61 Utah 265, 213 P. 182 (1923).

COLLATERAL REFERENCES

C.J.S. — 94 C.J.S. Waters § 315.

Key Numbers. — Waters and Water Courses — 217.

73-5-4. Head gates and measuring devices.

Every person using water in this state shall construct or install and maintain a substantial head gate, cap, valve or other controlling works, weir flume and measuring device at each point where water is diverted or turned out, for the purpose of regulating and measuring the quantity of water that may be used. Such controlling works or measuring device shall be of such design as the state engineer may approve and so that the same can be locked and kept set by him or his assistants; and such owner shall construct and maintain, when required by the state engineer, flumes or other measuring devices at such points along his ditch as may be necessary for the purpose of assisting the state engineer or his assistants in determining the amount of water that is to be diverted into his ditch from the stream or water source, or taken from it by the various users. Every owner or manager of a reservoir located across or upon the bed of a natural stream shall construct and maintain, when required by the state engineer, a flume or other measuring device of a plan to be approved by the state engineer, below such reservoir at a point approved by him, and a flume or measuring device above such reservoir on each stream or source of supply discharging into such reservoir, for the purpose of assisting the state engineer in determining the amount of water to which prior appropriators are entitled, and thereafter diverting it for such prior appropriators' use. If the owner of irrigation works, canals, reservoirs, wells, pumps or tunnels shall refuse or neglect to construct or install such head gates, caps, valves, flumes or measuring devices after thirty days' notice to do so by the state engineer, the state engineer may forbid the use of water until the user thereof shall comply with his requirement, or the state engineer may proceed to construct or install or cause to be constructed or installed such controlling works or measuring devices, and the cost of the same shall be a lien against the lands and water rights served thereby, and the state engineer is authorized to bring action in the name of the state to foreclose such lien.

History: L. 1919, ch. 67, § 68; R.S. 1933, 100-5-4; L. 1935, ch. 105, § 1; C. 1943, 100-5-4.

73-5-5. Construction and repair of dams — Submission of plans to engineer for approval — Supervision and inspection — Payment of expenses — Penalty for violation — Exceptions.

Duplicate plans, drawings and specifications for any impounding dam which will impound more than twenty acre-feet of water shall be submitted to the state engineer for his approval, thirty days before construction thereof shall begin. He shall examine such plans, drawings and specifications and, if he approves the same, he shall return one copy of each of such plans, drawings and specifications with his approval, to the person submitting the same, and file the other in his office. If the state engineer disapproves such plans, drawings, or specifications, or any part thereof, he shall return the same for correction and revision. Until the approval of plans, drawings and specifications has been obtained the construction and use of such dam is prohibited. The state engineer may keep an inspector on any such dam during the construction or